
(1950) 03 BOM CK 0020
In the Bombay High Court
Case No : O.C.J.A. No. 71 of 1949

The Asian Assurance Co. Ltd.

APPELLANT

Vs

Madholal Sindhu and Others

RESPONDENT

Date of Decision : 10-03-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 23 Rule 1, Order 23 Rule 1(2)

Citation : AIR 1950 Bom 378 : (1950) 52 BOMLR 386

Hon'ble Judges : Chagla, C.J.;Coyajee, J

Bench : Division Bench

Advocate : M.P. Amin and C.K. Daphtary, A.G, for the Appellant; H.M. Seervai and P.N. Bhagwati, for the Respondent

Final Decision : Allowed

Judgement

Chagla C. J.

1. This is an appeal from an order made by Bhagwati J., by which he gave the plaintiffs leave to withdraw the suit filed by them with liberty to file a fresh suit. The suit which the plaintiffs had filed was a representative suit and it was filed on 4th October 1949. On 5th October the plaintiffs made an ex parte application for receiver and an order was made on that application by Tendolkar J. On 18th October 1949, the plaintiffs' solicitors wrote to the defendants' solicitors that their clients had been advised to withdraw the suit and they did not propose to proceed with the same and they personally undertook to pay the costs of the notice of motion which was still pending which would be allowed to be dismissed. They further gave intimation to the defendants that they would apply on the following day for the order of withdrawal of the suit with liberty to file a fresh suit. Accordingly an application was made by the plaintiffs' attorneys for withdrawal of the suit with liberty to file a fresh suit. The application was made in Chambers and it was on that application that the learned Judge made the order against which this appeal is preferred.

2. Now, a preliminary point has been taken by Mr. Seervai that this order is not appealable as it is not a judgment within the meaning of Clause 15, Letters Patent. In our opinion, an order which deprives the defendant of a valuable right is certainly a judgment within the meaning of Clause 15. It is always open to a plaintiff to withdraw the suit or abandon part of his claim and the result of such withdrawal or abandonment of part of the claim would be that he would be precluded from instituting a fresh suit or re-agitate the matter to the extent of the withdrawal of his claim. But when the Court gives him leave to withdraw the suit with liberty to file a fresh suit, he is entitled to come to Court again on the same cause of action, and to that extent the right of the defendant is affected because it is open to the defendant to satisfy the Court that liberty should not be given to the plaintiff to file a fresh suit although he may withdraw the suit if he was so advised. Further, in giving liberty to file a fresh suit where leave to withdraw is given, the Court must come to a judicial decision and that decision is that it must be satisfied that the suit would fail by reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. It is only under these circumstances that the Court has power to make an order permitting the plaintiff to withdraw the suit with liberty to file a fresh suit. Our attention is drawn to a decision of this Court in *Narandas v. Shantilal* 22 Bom. L. R. 1012 : A. I. R 1921 Bom. 267. There, a suit was heard by Macleod C. J., for some length of time. He recorded evidence and he delivered a judgment, but the ultimate order that he made was that he allowed the plaintiff to withdraw the suit and gave him liberty to file a fresh suit. It was from that order that an appeal was preferred and a contention was raised before Sir John Heaton Ag. C. J., and Marten J., that that order was not a judgment and the Court held that it was a judgment within the meaning of Clause 15. Mr. Seervai attempts to distinguish this case by pointing out that the order of Macleod J. was made after the suit had gone on and the Court had heard various matters in dispute between the parties and after issues had been raised and after a judgment was actually delivered by Macleod J. Mr. Seervai says that in this case nothing has been done ; even the summons has not been served on the defendant. In our opinion, the distinction that Mr. Seervai tries to draw is a distinction without any logical basis. Whether Macleod J. had heard the suit for some time or not, the ultimate order that he made was giving leave to the plaintiff to withdraw the suit with liberty to file a fresh suit. It was that order that was attacked and challenged. The issues that Macleod J., had tried and in respect of which he had delivered judgment did not result in any adjudication by the learned Judge upon the merits of the case. He refused to adjudicate upon the disputes between the parties and the only order he made was, as I have pointed out, giving leave to the plaintiff to withdraw the suit with liberty to file a fresh suit. The mere fact that the defendant has not been served with a summons makes no difference to the position in law. The rights of the defendant are undoubtedly affected because he has a right to have the suit withdrawn by the plaintiff without liberty being given to him to file a fresh suit, and to the extent that that right is affected by the order of the Court, that order is a judgment and becomes appealable under

Clause 15.

3. Now, with respect to the learned Judge, we do not understand how this order came to be made in Chambers. This is not one of the matters which under the High Court Rules can be disposed of in Chambers, and in our opinion an application under Order 23, Rule 1, must always be made in open Court and the order must be made in Court. Further, it appears from the order which is drawn up that the other side was not heard at all and the order made was an ex parte order. In our opinion, no order under Order 23, Rule 1 (2), should ever be made without hearing the other side. The Court has to be satisfied, as I have pointed out before, that there is some formal defect by reason of which the suit would fail, and in order to decide that the Court is obliged to hear the other side and to hear what the other side has got to say on the contention put forward by the plaintiff. The Court cannot decide behind the back of the other side that there is some formal defect which entitles the plaintiff to avail himself of Order 23, Rule 1 (2).

4. Turning to the merits of the matter, although in this case the other side was not furnished with any affidavit which was made by the plaintiffs to satisfy the Judge that there was a formal defect and there is no judgment of the learned Judge from which we can ascertain what led the learned Judge to make this order, it is clear from the affidavit which was prepared that the only formal defect on which the plaintiffs relied was that two parties who should have been made parties to the suit were not so made and therefore the suit suffered from the defect of non-joinder. Surely, in our opinion, that is not a formal defect contemplated by Order 23, Rule 1 (2). The defect contemplated by it is one by reason of which the suit must fail. In this case the suit could not have failed by reason of non-joinder. The easiest and the simplest thing for the plaintiffs to have done was to have made those parties parties to the suit. There is a further difficulty to which Mr. Amin has drawn our attention. The suit filed is a representative suit and, therefore, besides the plaintiffs all those whom the plaintiffs represent were interested in the fate of the suit and the plaintiffs have obtained this order without in any way consulting that class whom they represent. It is perfectly true that the Court can give its consent to the compromise or withdrawal of a representative suit. But normally the Court does not do so without directing that the plaintiff should advertise in the papers that he proposed to take a particular course of action, and if no objection is forthcoming, then the Court ordinarily passes the order. But it does not appear from the order made by the learned Judge that it was present to his mind that he was permitting a representative suit to be withdrawn without the persons represented by the plaintiffs being consulted at all.

5. Under the circumstances, we think that the order made by the learned Judge cannot stand. We, therefore, allow the appeal with costs and set aside the order made by the learned Judge. One counsel certified.